TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA. NO.1644/99

BETWEEN

ENWARD ANTHONY ISAAC

Plaintiff

AND

ANTHONY DEO GANESS &
MARCINA MARCIA GANESS

Defendants

Before: The Hon. Justice Nolan Bereaux

Appearances: Mr Gaston Benjamin for Plaintiff
Mr Carlton George for Defendants

JUDGMENT

The plaintiff's claim against the defendants is for specific performance of an agreement in writing dated April 12, 1999 for the sale to the plaintiff of a parcel of land situate at Mausica, Arima known as Lot No. 1 Eastern Main Road together with the dwelling house thereon at the price of $225,000.00. He also claims damages in lieu of or in addition to specific performance for breach of contract; a declaration that the plaintiff has a lien on the said lands for the deposit paid and for any damages and costs awarded to the plaintiff in the action; and costs.

Statement of Claim

The plaintiff contends that:

(1) By an agreement contained in or evidenced by a memorandum in writing dated April 12, 1999, the defendants, who are husband and wife, agreed to sell and the plaintiff agreed to purchase the property for the price or sum of $225,000.00.

(2) On April 12, 1999, the plaintiff paid the defendants by way of deposit on the purchase price the sum of $22,500.00 being 10 percent of the purchase price.

(3) Clause 3 of the agreement for sale provided for completion to take place within 90 days of April 12, 1999.

(4) By a memorandum in writing dated May 24, 1999 signed by the defendants and witnessed by their daughter, the defendants requested an extension of four months for the completion of the sale and the delivery of vacant possession.

(5) On or about July 14, 1999 the plaintiff, through his agent, orally informed the defendants that he was ready and able to complete the sale and requested the defendants to attend upon his attorney at law to execute the deed of conveyance and receive the balance of the purchase price in the sum of $202,500.00. The defendants did not respond.

(6) On or about July 22, 1999 the plaintiff's attorney at law informed the defendants that he was holding Republic Bank Ltd draft No. 1148874 dated July 13, 1999 made payable to them in the sum of $202,500.00. He further informed the defendants that he had an engrossed conveyance ready for execution and that the defendants should attend at his Chambers to execute the deed and collect the bank draft.

(7) The defendants attended upon the plaintiff's attorney on or about July 25, 1999 and in breach, orally indicated that they no longer wished to sell the property.

(8) The plaintiff is now and was at all material times ready and willing to complete the sale.

The defence

It is not disputed by the defendants that they agreed to sell the property. It is also not in dispute that the defendants accepted the sum of $22,500.00 being 10% of the sale price and that the agreement for sale provided for completion within 90 days of April 12, 1999. The defendants contend that following upon the latter, the date for completion of the sale was on 12th July, 1999.

They deny that by letter dated 24th May, 1999, they requested of the plaintiff a period of four months after the completion date to vacate the

premises. They contend that the letter did not amount to a request for an extension of time nor did it evince an intention to extend the time for completion. The defendants assert that their request for additional time to vacate the premises was neither responded to nor acceded to by the plaintiff. I must confess that I found this aspect of the defendants' pleading to be contradictory. It is either that they made a request for an extension which was not acceded to or they did not. The relevant paragraph has not been put in the alternative and the purport of the pleading is unclear.

The defendants deny that on the 14th July, 1999, or any date prior thereto, the plaintiff expressed any intention or did any act evincing an intention that he was ready, willing and able to complete. They contend that even if the plaintiff were ready, willing and able to complete, the time for completion had lapsed without any extension having been granted, time being of the essence.

The defendants say that they were invited by the plaintiff's agent to the Chambers of the plaintiff's attorney-at-law to discuss whether they could continue to occupy the property after completion or whether the deposit should be returned to the plaintiff and that no discussion took place.

They say it is the plaintiff who is in breach because he was not ready and willing and able to complete on 12th July, 1999.

The defendants counterclaim for the following reliefs:

(1) A declaration that the time for the completion of the contract of sale was the 12th July, 1999.

(2) A declaration that the letter of the 24th May, 1999 was not an extension of time for the completion of the contract.

(3) A declaration that the plaintiff was not on or before the 12th July, 1999 ready, willing and able to complete the contract of sale.

(4) A declaration that the plaintiff repudiated the said contract by not completing same on the said 12th July, 1999 and that the defendants are entitled to accept the repudiation of the contract and forfeit the deposit of in accordance with clause 5 of the agreement for sale, and costs.

<u>The reply and defence to counterclaim</u>

In reply and in defence to the counterclaim, the plaintiff states that the defendants were themselves not in a position to complete on July 12, 1999, because they could not give vacant possession and contends that the payment of the balance of the purchase price by the plaintiff and the

giving of vacant possession were simultaneous acts to be performed by the plaintiff and defendants.

He contends in the alternative that, if the defendants' visit to the Chambers of the plaintiff's attorney-at-law on July 23, 1999 were to discuss the defendants' continued occupation of the property after completion of the sale, both sides were obviously treating the agreement as alive on July 23, 1999 and the defendants are estopped from saying the agreement was at an end.

The issues

There are two main issues in this case:

(1) What was the effect of the letter of 24th May, 1999?

(2) Was time truly of the essence of the contract?

The first issue requires that I make a finding of fact as to whether an extension of time for the giving of vacant possession was granted to the defendants by the plaintiff. The second issue is entirely dependent on my findings on the first.

Agreed documents

Documents tendered into evidence by consent were:

(1) Letter of the plaintiff dated 24th May, 1999 – Exhibit A

(2) Agreement between the plaintiff and the defendants dated 12th April, 1999 – Exhibit B

(3) Letter dated July 22, 1999 from plaintiff's attorney to defendants – Exhibit C

(4) Unexecuted deed between plaintiff and defendants – Exhibit D

(5) Republic Bank draft No. 21148874 payable to them in the sum of $202,500.00 – Exhibit E

The evidence

Three witnesses testified in this case. The plaintiff and Alexia Roberts on his behalf and Ms Anne-Marie Ganess, daughter of the defendants, on their behalf.

Enward Isaac

The plaintiff identified Exhibit B as the document he executed on 12th April, 1999. The agreement was executed after having visited the property. The defendants were present at the time of his visit, so too Ms Roberts, who did most of the talking to the defendants while he looked around. He spoke to the defendants in the presence of Ms Roberts concerning the selling of the house. Having signed the document, he gave "Miss Alexia" as he described her, a cheque for the down payment

and returned to the U.S.A. where he is resident. While in America, he spoke with Ms Roberts.

Having spoken with her, he returned to Trinidad and Tobago in early July, 1999 with the balance of the purchase money, to complete the purchase. It emerged from cross-examination by Mr George that he spoke to Ms Roberts about 2-3 days after he arrived and she indicated that the defendants were not able to procure alternative accommodation. It appears from the evidence of both Ms Roberts and Ms Ganess that the defendants had intended to move closer to Port of Spain by purchasing a house with the proceeds of the sale.

He later procured a bank draft in the sum of $202,500.00 representing the balance of the purchase price. The bank draft is dated 13th July, 1999 which is one day later than the proposed date of completion. The plaintiff explained that it was dated 13th July, 1999 because of the defendants' difficulties with procuring another house in which to live. He went to an attorney at law, Mr Gaston Benjamin, and gave instructions for the deed to be prepared. He attended his lawyer's office on 23rd July, 1999. Also present were the defendants, Ms Ganess and Ms Roberts. Mr Benjamin was also present. He handed the bank draft to Mr Benjamin. There was a conversation between Mr Benjamin and the defendants and Ms Ganess. Ms Ganess dropped the bank draft on the desk and all three left. None of

them, according to the plaintiff, said anything about the sale of the property to him, nor did Ms Ganess say why she was not accepting the bank draft.

This plaintiff was not the quickest witted of persons. He was slow to understand questions put to him and to the exasperation of Mr Benjamin, had difficulty answering the most basic of questions. Under cross-examination by Mr George he stated that he left no one in charge of the sale but subsequently described Ms Roberts as his agent for completion of the sale. Despite his sometimes inconsistent evidence on this aspect, I found him to be a truthful witness. He conceded under cross-examination that he understood the completion date to be 12th July, 1999 and that he did not pay the balance of the purchase price on that date. He also conceded that between 13th July to 23rd July, 1999 he did not present a deed of conveyance of the property to the defendants for their execution.

Alexia Roberts

Ms Roberts was not always forthcoming with her evidence. Under cross-examination she was at times evasive and inconsistent, but taken as a whole, her evidence was that of a truthful witness.

She testified to witnessing the agreement. The down payment was paid to Mr Anthony Ganess. She assisted the defendants in their efforts at finding

another house. The plaintiff returned to America after executing the agreement.

The witness stated that in May 1999, the defendants were still unable to find another suitable residence. They requested an extension of time for vacating the premises. She conveyed that request to the plaintiff. As a result of the request Ms Ganess prepared a letter and sent it to Mr Isaac. The letter reads as follows:

A.M Ganess Real Estate Services

Residential and Commercial Sales and Rentals

"The Friendly Service"

May 24, 1999

Mr Enward Isaac
3500 Hillesmer Road
Baltimore, Maryland
21207 U S A

Dear Sir

Re: Sale of Property located at Lot #1 Eastern Main Road, Arima

The following serves to confirm our recent conversation between Ms Ann-Marie Ganess (Vendors' daughter) and yourself with respect to the abovementioned property.

The vendors, namely Mr & Mrs Anthony Ganess will be allowed to occupy the said premises for an initial period of four months, further to date of completion of sale.

Any further extension from this date, along with the terms and conditions of the said extension, will be negotiated on your arrival in Trinidad.

We wish to express our sincerest appreciation for your consideration in this matter.

Yours truly

/s/ Vendor's Daughter

The letter is signed by both defendants as vendors and by Ms Ganess; and by the plaintiff's agent but not by the plaintiff.

In my judgment on the totality of the evidence of this case Ms Roberts was in fact the plaintiff's agent and her signature was sufficient to bind him. I shall return to this issue. Ms Roberts said that up to 12th July, the defendants had not found alternative accommodation. In the meantime, the plaintiff had come to Trinidad and Tobago in early July 1999 and had contacted her. She told him that the Ganesses had changed their minds and were no longer selling. On 23rd July, 1999 at the offices of Mr Benjamin, Mr Benjamin presented a cheque to the defendants to complete the sale. Present were, the plaintiff, his wife, Mr Benjamin, the defendants, Ms Ganess and Ms Roberts.

The deed of conveyance was presented for execution. The defendants did not sign the deed nor did they accept the cheque for the balance of the purchase price and left the office.

Under cross-examination by Mr George, Ms Roberts said that both she and Ms Ganess spoke to the plaintiff by overseas telephone conversation from Ms Ganess' home to inform him of the contents of the letter. She added that when the plaintiff returned in July 1999 there was no need to discuss the letter with him. She denied being told on or before May 1999 that the defendant's daughter was returning to their home and that was the reason for requesting an extension of time. She said she was told of that matter in June/July 1999 and that the defendants had consequently

changed their mind about selling the house. She set up the meeting of 23rd July, 1999 at the plaintiff's and Mr Benjamin's request and she informed Ms Ganess that the purpose of the meeting was to complete the sale. She could not recall if one of the purposes of the meeting was to discuss the return of the down payment by the defendant.

Evidence on behalf of defendants

Anne Marie Ganess

Anne Marie Ganess testified that she was a real estate agent and was aware of the sale agreement executed between the plaintiff and her parents. She had no dealing with the plaintiff concerning the transaction. She did have written correspondence with him. She had sent a letter dated 24th May, 1999 to him further to having a discussion with him on the telephone. I understood the telephone conversation to have been trans-Atlantic. She added that her parents were seeking alternative accommodation by way of purchase of another house, after having signed the sale agreement. Six weeks had passed since the agreement but they had not found nothing suitable. The letter of 24th May sought permission of the plaintiff for extra time to occupy the premises. There was also the fact that her sister needed to return to the defendant's home with her children. That was a second reason for seeking extra time. These were told to the plaintiff and Ms Roberts. Her conversation with the plaintiff took place on 23rd May, 1999 the day before the letter was written.

According to Ms Ganess the plaintiff never responded in writing and after 24th May, 1999, there was no written response from the plaintiff or his agent.

I pause here to note that Ms Ganess in her examination in chief does not state that the plaintiff gave no oral consent to the extension. I shall return to it later in this passage.

Ms Ganess said that on 22nd July, 1999 she was invited to a meeting at Mr Benjamin's office, by Ms Roberts the day before the meeting was scheduled. Issues weren't really proposed, Ms Roberts suggested that one of the matters to be discussed would be extra time to occupy the premises and she, Ms Ganess suggested the return of the plaintiff's deposit. She attended the meeting as agent of the defendants. The witness said that at the date of the meeting the parties were aware that the date of completion had passed. Those present were the same as Ms Roberts described. Before the meeting, they were handed a letter from Mr Benjamin dated July 22, 1999 which indicated the plaintiff's readiness to complete the transaction. When the meeting commenced she returned the plaintiff’s deposit by placing the cheque on Mr Benjamin's desk. Ms Roberts then took the cheque and handed it back to her.

Under cross-examination by Mr Benjamin, Ms. Ganess stated that at the beginning of the meeting on 23rd July, she knew why the plantiff's lawyer had called the meeting. She added that her parents did not ask to see the draft nor did she ask to see it. The meeting was a very short one, Mr. Benjamin was *"a bit aggressive"* and her mind no proper discussion could continue.

As to the telephone conversation with the plantiff on 23rd May, 1999 which she made at her home, she conceded, (after Mr. Benjamin was forced to repeat his question several times), that the plantiff gave his verbal agreement to the extension and that she wrote a letter confirming what was discussed. Ms. Ganess, no doubt, aware of the impact of her admission, then sought to recant that admission by denying ever having said it. Shown the letter by Mr. Benjamin and asked to explain the reason for the phrase "*we wish to express our sincerest appreciation for your consideration in this matter*", Ms. Ganess answered that "*it was an appreciation for what had not yet happened. It was futuristic. The plaintiff was to sign the letter. It was only a request.*"

Findings of fact

The question is whether there was agreement between the parties to extend the time for the defendants to vacate the premises. The plaintiff in his evidence made no reference to any transatlantic telephone discussion

with Ms Ganess concerning such an extension. Indeed, he made no reference to any extension at all. However, both Ms Roberts and Ms Ganess spoke of it and the letter (Exhibit C) speaks for itself.

Ms Ganess when confronted with the wording of the letter sought to persuade me that it was simply a request. She also recanted her earlier admission that the plaintiff had orally agreed to the extension. She was unconvincing.

I have no doubt, having heard her and having read the letter, that the plaintiff did give verbal consent to the extension and that the letter was sent by Ms Ganess as agent of the defendants and in confirmation thereof. As Mr Benjamin suggested it was sent as evidence of the verbal agreement. The letter is written in terms which suggest prior verbal agreement and it expresses the defendants' appreciation for the indulgence. In any event the evidence of Ms Roberts is that she spoke with the plaintiff by telephone on 23rd May, 1999 and that she signed as his agent and that there was no need for further discussion of the letter with him when he returned in early July 1999, having already spoken with him on 23rd May, 1999. In my judgment, even without the oral consent of the plaintiff, Ms Roberts' signature was sufficient to bind him.

I turn now to the effect of the letter of 24th May, 1999. Mr Benjamin sought to persuade me that the letter extended completion either to 24th September or 12th November, 1999, but that submission cannot be supported when the letter is truly read. It speaks of permitting the vendors to occupy the premises for an initial period of four months, "further to date of completion".

I understand that to mean up to four months after the date of completion; that is to say, the letter extended the date for giving vacant possession to four months after the completion date. It did not itself extend the completion date. From the terms of the contract that date remained 12th July, 1999.

Whether time is truly of the essence

It is clear from the evidence that on 12th July, 1999, the plaintiff made no effort to complete the sale. Mr George submits that the defendants were thereafter entitled to treat the contract as at an end. Whether that is so or not depends on whether time was truly of the essence. If time were of the essence then the plaintiff's failure to complete would have entitled the defendants to treat the contract as at an end.

In Stickney v Keeble [1915] A.C. 386 at 416 Lord Parker said that no equity arises:

> ***"where the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract."***

An express provision in a contract that time is of the essence with regard to the default in question would render it "ordinarily inequitable to grant relief from the legal consequences of lateness of performance." – **Spry, Equitable Remedies, 5th Edition pg. 206**

It is a question of the intention of the parties to be gleaned from the contract and from the facts and circumstances of the case. In **Stonham's "The law of Vendor and Purchaser**" at pg. 738 para 1444 under the rubric **"Time of the Essence - by Express Agreement"** the following passage appears:

> ***" it was even supposed that Courts of Equity would not permit parties to make time of the essence of the contract by express agreement. This is not so.***

Nevertheless, to have that effect in equity, the language must, clearly and unmistakably, show that the intention of the parties was to make their rights depend on the strict observance of the prescribed time limits…

Be that as it may, it is not the only way of expressing the intention - the question is always one of construction; and the contract may contain other stipulations, which are inconsistent with the intention that time is intended to be of the essence of the contract."

The facts and circumstances of a given case may be such that although it is expressed to be of the essence, time may cease to be of the essence in equity. See **Spry, Equitable Remedies (supra)** at pg 211. The governing principle is that time may cease to be of the essence if circumstances arise that render it unjust to do so. Where time is made of the essence of a contract it may also be waived by the conduct of the parties.

Clause 3 of the agreement provides as follows:

"the balance of the purchase price being the sum of two hundred and two thousand and five hundred dollars

> ***($202,500.00) shall be paid by The Purchasers to The Vendors within three months (90 days) from the date hereof which time shall be of the essence and upon The Purchasers paying the balance of the said purchase price to The Vendors, The Vendors shall execute a proper deed of assurance of the said property conveying the said property to The Purchasers with vacant possession."***

As Clause 3 indicates it was the original intention of the parties that the plaintiff would pay the balance of the purchase price on or before 12th July and that the defendants would thereupon convey the property to him with vacant possession. In my judgment it is on this basis that time was made of the essence. The question is what was the effect on this provision of the extension of time granted to the defendants to vacate the premises.

The plaintiff did not complete on 12th July, 1999. His evidence is that the defendants were having difficulty locating a home and he did not press to complete. As the plaintiff has pleaded in his reply however the payment of the balance of the purchase price and the giving of vacant possession were simultaneous acts to be performed by the plaintiff and the defendants. The defendants were not in a position to give vacant possession on the 12th July, 1999 and would themselves have been in

breach of the contract but for the extension of time. The plaintiff, having agreed to extend the date of delivery of vacant possession, cannot in those circumstances be held to strict time limits as to payment. It is a necessary implication in the circumstances that the provision as to time being of the essence was varied when he granted an extension of time for vacant possession. I hold that the letter of 24th May, 1999 amounted to a variation of the provisions of clause 3 of the contract with respect to the giving of vacant possession by the defendant and with respect to time being of the essence. I find that on the totality of the evidence, time was not of the essence of the agreement.

Time not being of the essence the authorities show that when the plaintiff failed to complete on 12th July, the defendants at best were entitled to serve a notice on the plaintiff, once again making time of the essence and calling upon the plaintiff to complete the transaction within a reasonable time. It is only after that period of notice had expired that they could treat the contract as having been determined. They could not have repudiated the contract for the plaintiff's breach on 12th July because it was breach of a non-essential term. In **Bidaisee v Sampath and others** Civ. App. #165 of 1985 Gopeesingh J A said at pgs. 31 to 32:

> ***"…I hold that in a contract which fixes a date for completion (as opposed to an open contract), if one***

party fails to complete by that date, although time is not made of the essence in that contract, the party in default is deemed to be in breach of that non-essential term. The date fixed for completion cannot be treated as a mere target date. As a result the innocent party may immediately thereafter give a notice that the other party is in breach of contract and make time of the essence. However, the time limited for completion by that notice has to be reasonable. It is no longer necessary to wait until there has been an unreasonable delay after that breach before such a notice may be served. Such a breach of a non-essential term does not, however, entitle the innocent party to treat the said breach as a repudiation of the contract, justifying rescission and to rely on same as a ground for avoiding an action for specific performance by the party in breach. It is only if the party, after being served with a notice to complete within that reasonable time is in breach and fails to complete within that reasonable period fixed by the notice (which in effect makes time of the essence) that the innocent party can treat such failure as a repudiation of the contract justifying rescission."

A similar ruling was made in **Charles Rickards Ltd v Oppenhaim** [1950] 1KB 616, in which it was held that a buyer who continued to press for delivery after the lapse of the stipulated time on a contract for the sale of goods in which time is of the essence, had waived his right to cancel the contract but he thereafter had a right to give reasonable notice for delivery thus making time again of the essence which, if not fulfilled, gave him the right to cancel the contract. The defendant in that case was the buyer and the English Court of Appeal held that having served such a notice after waiving the initial breach, the defendant was entitled to treat the contract as at an end when the period of notice had expired. Lord Denning L.J. said at page 623:

> ***"…If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights.***

That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

…So, if the matter had stopped there, the plaintiffs could have said, notwithstanding that more than seven months had elapsed, that the defendant was bound to accept; but the matter did not stop there, because delivery was not given in compliance with the requests of the defendant. Time and time again the defendant pressed for delivery, time and time again he was assured he would have early delivery; but he never got satisfaction; and eventually at the end of June he gave notice saying that, unless the car were delivered by July 25, 1948, he would not accept it. The question thus arises whether he was entitled to give such a notice, making time of the essence."…

Lord Denning in conclusion said at pg. 624 that:

"the defendant was entitled to give a reasonable notice making time of the essence of the matter. Adequate protection to the suppliers is given by the requirement that the notice should be reasonable."

In my judgment it is the defendants in this case who, having been indulged by the plaintiff with respect to the time for the giving of vacant possession, cannot now insist on the provision as to time being of the essence by holding the plaintiff to the completion date on 12th July, 1999. But in any event I have serious doubt about the bona-fides of the defendants' reasons for repudiation. The plaintiff was ready willing and able to complete the transaction on 23rd July, 1999 but the defendants refused to execute the conveyance. I do not accept that their reasons for doing so had anything to do with the failure of the plaintiff to complete on 12th July, 1999. It merely presented them with an opportunity which they thought would allow them to escape their obligation. The true reasons were that they had changed their minds about the sale because of their difficulties in securing an alternative residence and because of their daughter's imminent return home. The plaintiff, having subsequently indicated on 23rd July, 1999 his willingness to complete, the defendants were obliged to uphold their end of the bargain.

There shall be judgment for the plaintiff and I shall order as follows:

(1) That the agreement dated 12th April, 1999 referred to in the writ of summons and statement of claim herein, be

specifically performed and carried to execution by the parties.

(2) That the defendants execute an engrossment in the form of Exhibit D on or before 31st May, 2001 and to exchange the same with the plaintiff for the balance of the purchase price within fourteen days after execution.

(3) In default, the Registrar of the Supreme Court shall execute upon payment to the Registrar on behalf of the defendant of the sum of $202,500.00 representing the balance of the purchase price.

The defendants will pay the plaintiff's costs to be taxed in default of agreement. The defendant's counterclaim is dismissed with costs. There shall be a stay of execution for 21 days and liberty to apply.

NOLAN P G BEREAUX
Judge

11th May, 2001